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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THOMAS WINFORD SIMMONS — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

JOHN W. SETTLE
P. O. BOX 1902
FORT SMITH, ARKANSAS 72902
(501) 785-2326

Counsel for Petitioner,
pro hac vice

QUESTIONS PRESENTED

I. WHETHER A "DEATH-QUALIFIED JURY" SELECTED FOR ITS ABILITY TO IMPOSE THE DEATH PENALTY IS MORE PRONE TO CONVICT A DEFENDANT THAN A JURY NOT SO SELECTED AND WHETHER SUCH A JURY IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY THUS DEPRIVING A CAPITAL MURDER DEFENDANT OF DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

II. WHETHER THE ABSOLUTE FINANCIAL LIMITATION FOR INVESTIGATIVE ASSISTANCE OF $100 SET OUT IN ARK. STAT. ANN SECTION 43-2419 IS INADEQUATE AND VIOLATIVE OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

III. WHETHER PETITIONER WAS ARRESTED ILLEGALLY AND THE MATERIALS, INFORMATION, AND CONSENT TO SEARCH GAINED SUBSEQUENTLY WERE TAINTED BY THE ARREST AND SEIZED IN VIOLATION OF PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS THUS REQUIRING SUPPRESSION OF ANY EVIDENCE OBTAINED THEREFROM.

IV. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY THE STATE'S FAILURE TO DISCLOSE THE IDENTITY OF A POTENTIALLY CRUCIAL WITNESS.

V. WHETHER ARK. STAT. ANN SECTION 41-1501, ARKANSAS' CAPITAL MURDER STATUTE, BY OVERLAPPING WITH ARK. STAT. ANN SECTION 41-1502, THE FIRST DEGREE MURDER STATUTE, DENIES DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH AMENDMENT, EIGHTH AMENDMENT, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Thomas W. Simmons (hereafter Petitioner), a prisoner sentenced to die in the Arkansas electric chair, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming Petitioner's conviction and sentence is reported at Simmons v. State, 278 Ark 305, 645 SW2d 680 (February 7, 1983). A copy of the opinion is included in the Appendix. The Arkansas Supreme Court denied Petitioner's Petition for Rehearing on March 14, 1983. A copy of the Order is also included in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on February 7, 1983. The Arkansas Supreme Court denied the Petition for Rehearing on March 14, 1983. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) with Petitioner asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States

made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Arkansas Rules of Criminal Procedure, Rule 17.1:

> (a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> (1) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial . . . .
>
> (d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Ark. Stat. Ann Section 41-802:

> (1) If a defendant is found guilty of an offense by a jury, the jury shall fix punishment as authorized by this Article (Sections 41-801 - 41-1309)

Ark. Stat. Ann Section 41-803:

> (1) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this Article (Sections 41-801 - 41-1309)
>
> (2) A defendant convicted of capital murder shall be sentenced to death or life imprisonment without parole in accordance with Chapter 13

(Sections 41-1301 - 41-1309)

(3) A defendant convicted of an offense other than capital murder may be sentenced:

(a) to pay a fine as authorized by Chapter 11 (Sections 41-1101 - 1104) of this Article; or

(b) to imprisonment as authorized by Chapter 9 (Sections 41-901 - 41-904) or 10 (41-1001 - 41-1005) of this Article; or

(c) to pay a fine and to imprisonment.

Ark. Stat. Ann Section 41-901:

(1) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:

(a) For a Class "Y" felony, the sentence shall be not less than ten (10) years and not more than forty (40) years, or life, . . .

Ark. Stat. Ann Section 41-1301:

This statute is found in the Appendix, page

Ark. Stat. Ann Section 41-1501:

(1) A person commits capital murder if:

(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . .

(3) Capital murder is punishable by death or life imprisonment without parole pursuant to Chapter 13 (Sections 41-1301 - 41-1309)

Ark. Stat. Ann Section 41-1502:

(1) A person commits murder in the first degree if:

(a) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . .

(3) Murder in the first degree is a Class "Y" felony.

Ark. Stat. Ann Section 43-412:

An arrest is made by placing of the person of the defendant in restraint, or by his submitting to the custody of the person making the arrest.

Ark. Stat. Ann Section 43-2419:

Whenever legal counsel is appointed by any court of this State to represent indigent persons accused of crimes, whether misdemeanors or felonies, such court shall determine the amount of the fee to be paid the attorney and an amount for a reasonable and adequate investigation of the charges made against the indigent and issue an order for the payment thereof. The amount allowed for investigation expense shall not exceed One Hundred Dollars ($100) and the amount of the attorney's fee shall not be less than Twenty-Five Dollars ($25.00) nor more than Three Hundred and Fifty Dollars ($350.00) . . .

18 U.S.C. Section 3006 A:

This statute is found in the Appendix, page

Fourth Amendment:

This right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

> (N)or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment:

> (N)or cruel and unusual punishments inflicted.

Fourteenth Amendment:

> (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted of capital murder and was sentenced to die in the Arkansas electric chair. The information against him in January, 1981 (App., p.A20) alleged that as to three of the victims, that while committing the offenses of rape, robbery, and kidnapping he had caused the death of these people under circumstances manifesting extreme indifference to the value of human life. As to the fourth victim, Petitioner was charged with causing the death of a police officer acting in the line of duty. It was alleged that all of these offenses

occurred on January 5, 1981.

On January 6, 1981, Petitioner was taken into custody at his work site by Fort Smith, Arkansas police officers who questioned Petitioner and secured a consent to search Petitioner's automobile. Various items were seized, including a license plate and matchbooks, which were introduced by the State into evidence against Petitioner during his trial over his objection.

Prior to trial, Petitioner filed numerous motions. Petitioner challenged the legality of his arrest and the subsequent seizure of items from his vehicle. Petitioner also moved the trial court to authorize funding for investigative assistance alleging that the $100 limitation set out in the Arkansas statute was unconstitutional. Petitioner further moved that choosing prospective jurors on the basis of their ability to impose the death penalty would result in a jury not only prone to convict but also not representative of a true cross-section of the community. Finally, Petitioner moved that the information filed against him be quashed as the Arkansas capital murder statute and first degree murder statute overlapped resulting in an arbitrary and capricious application of the death penalty. Full hearings were held by the trial court and all motions were denied.

Prior to the trial, defense counsel had attempted to ascertain the identity of the person whom had notified the police of the location of the last body. Counsel were advised that the caller was anonymous. Only at the trial did the officer admit that he knew the identity of the caller from the beginning and had deliberately withheld identification at the caller's request. Petitioner's motion for a mistrial was denied by the trial court.

These issues were raised on appeal to the Supreme Court and were addressed by that Court in its opinion. The Arkansas Supreme Court concluded that Petitioner consented to accompanying

the officers to the police station, was therefore not under arrest which meant that the entire search and seizure was legal. The Court also ruled that the $100 limitation was not unconstitutional and that counsel had not indicated how the funds were to be used even if granted. The Court summarily rejected the challenge to "death qualification" of the jury and the challenge to the capital murder statute. The Court also ruled that the trial court did not err in refusing to declare a mistrial upon the discovery of the officer's failure to disclose the identity of the caller, noting that there was no indication that the prosecuting attorney was personally aware of the caller's identity and that the officer did not act in bad faith. From the affirmance of the conviction and sentence, Petitioner seeks a writ of certiorari from this Court to review the decision of the lower court.

REASONS FOR GRANTING THE WRIT

I. THE JURY CHOSEN TO HEAR PETITIONER'S CASE WAS QUESTIONED AND SELECTED ACCORDING TO THEIR ABILITY TO IMPOSE THE DEATH PENALTY AND WAS THUS MORE PRONE TO VOTE FOR CONVICTION THAN A JURY NOT SO CHOSEN AND WAS NOT REPRESENTATIVE OF A TRUE CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Prior to his trial, Petitioner filed a motion seeking to prohibit the trial court from attempting to "death qualify" the jury (R.246-248). Petitioner argued that such a jury was not representative of a cross-section of the community and was more prone to convict and upon conviction vote for a harsher penalty than a jury not so constituted (it should be noted that under Arkansas law, juries in all

criminal cases determine penalty as well as guilt or innocence. Ark. Stat. Ann Sections 41-802, 41-1301) The trial court denied the motion stating that it would follow the guidelines set out in Witherspoon v. Illinois, 391 US 510 (1968) (R.613-614). At voir dire, the jurors were questioned and chosen on the basis of their ability to impose the death penalty. The Arkansas Supreme Court held this issue was without merit (App., p. A11)

In Witherspoon v. Illinois, supra, the Court ruled that while a State could seek a jury capable of imposing the death penalty, it could not establish a procedure whereby those persons voicing reservations about the death penalty must be excused as such a jury would be uncommonly apt to impose the death penalty. The Court declined to decide whether a "death-qualified" jury would be more prone to convict than a jury not so qualified as the data presented in support of this contention was viewed to be too "tentative and fragmentary". Petitioner submits that substantial and reliable research has now been done. Numerous studies have been undertaken since 1968 which clearly indicate that a "death qualified" jury is indeed conviction prone. Petitioner introduced five such studies: "Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law", Goldberg, Harvard Civil Rights Civil Liberties Law Review, Vol. V, No. 1, January, 1970 (R.528). Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen", 42 Colorado Law Review, 1 (1970)(R.546). Jurow, "New Data on the Effect of a 'Death-Qualified' Jury on the Guilt Determination Process", 84 Harvard Law Review 507 (1971)(R. 563). White, "The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries", 58 Cornell Law Review 1176 (1973); Girsh, "The Witherspoon Question: the social science and the evidence", NLADA Briefcase, (September, 1978). For an in-depth discussion of these and other studies, see

Hovey v. Superior Court, 28 Cal.3d 1, 168 Cal Rptr 128, 616 P2d 1301 (1980); "Death Qualified Juries: The 'Prosecution-Proneness" Argument Reexamined." 41 Pittsburgh Law Review 353 (Spring 1980). In Grigsby v. Mabry, 483 F.Supp 1372 (E.D. Ark, 1980), affd, 637 F2d 525 (8th Cir. 1980), the District Court found these studies to be persuasive, a ruling left undisturbed by the Court of Appeals. The truth of this assertion is shown in actual practice: prosecutors will pre-emptorially challenge even those jurors who voice only reservations about the death penalty and thus do not fall within the purview of the Witherspoon limitations. Only in a death penalty case is a jury chosen according to its ability to impose the maximum penalty. In other cases under Arkansas' law, it is impermissible for a jury to be selected on its ability to impose the maximum penalty. Haynes v. State, 270 Ark 685, 606 SW2d 563 (1980). Arkansas' capital murder statutes establish a bifurcated procedure wherein the sentence is determined in a "trial" separate from the trial on guilt or innocence. Ark. Stat. Ann Section 41-1301 (App., p.A17) This procedure is similar to the Missouri system discussed in Bullington v. Missouri, 451 US 430 (1981). A juror's eligibility to decide guilt or innocence is predicated solely upon his ability to impose the maximum penalty. There is no provision under Arkansas' law wherein separate juries can decide guilt or innocence and penalty. Coble v. State, 274 Ark 134, 624 SW2d 421 (1981). A jury selected pursuant to Arkansas' capital murder procedure is more predisposed to convict capital murder defendants than the juries in all other Arkansas criminal cases. The question becomes not whether a juror can be fair but whether he can impose the maximum penalty. This procedure clearly deprives capital murder defendants of due process of law and equal protection of the law in violation of the Fifth and Fourteenth Amendments.

In addition, "death qualified" juries do not represent a

true "cross-section" of the community. Duncan v. Louisiana, 391 US 145 (1968); Taylor v. Louisiana, 419 US 522 (1975); Duren v. Missouri, 439 US 357 (1979). Those persons opposed to the death penalty are a large and identifiable group. See The Harris Survey, Louis Harris and Associates, Inc., June 11, 1973, Table 314, "which indicates that at least 16% of those polled would be excluded when Witherspoon is applied." Grigsby v. Mabry, supra. This large group is excluded from determining the issue of guilt in Arkansas capital murder cases which means that the jury is exclusive of a recognizable segment of the community. The defendant is thus not tried by the community as a whole and the deprivation he suffers is basic and fundamental. The jury selected does not reflect community-wide common sense and restraint. A jury which excludes a recognizable section of the community cannot be said to comply with the Constitutional requirement of a "impartial jury" from the district where the offense was committed.

The Court should grant the petition for certiorari in this case. The Court should rule that a jury procedure which excludes persons opposed to the death penalty does not provide the Constitutionally mandated "impartial jury" and order that a new jury selection procedure be established in this and all other death penalty cases.

II. THE LIMITATION OF $100 FOR INVESTIGATIVE ASSISTANCE SET OUT IN ARK. STAT. ANN SECTION 43-2419 DEPRIVED PETITIONER OF DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Soon after being appointed to represent Petitioner, counsel moved the trial court to provide funds for investigative assistance and to declare the limitation of $100 set out in

Ark. Stat. Ann Section 43-2419 to be violative of the Fifth and Sixth Amendments. Counsel alleged that they were the only two public defenders in the county; that they had numerous other cases (including a death penalty case) to work on; that the present case presented numerous details to investigate; and that the public defender's office could not employ an investigator due to lack of funding for such a position (R.31-34). The trial court refused to declare the statute unconstitutional and, as Petitioner was charged in two different counties for actions arising out of the same incident, granted $100 from each county, advising Petitioner that if the case in the second county proceeded to trial he would not be entitled to further investigative aid. (R.346) The Arkansas Supreme Court agreed with the trial court stating further that defense counsel had not indicated how any additional funds would be used.

Petitioner in this case was charged with committing four capital murders. The circumstances surrounding the offense were vague and mysterious. There was no believable direct evidence and little circumstantial evidence implicating Petitioner. Due to the utter lack of solid information, extensive and intensive investigation on behalf of Petitioner was necessary. Although defense counsel attempted to interview witnesses and examine the various scenes, it was impossible to undertake the detailed (and expert) investigation necessary. The funds provided were wholly inadequate for the investigation of a totally mysterious offense like this offense. Petitioner certainly could not rely on the official investigations of the police as their energies were concentrated solely on accumulating evidence against the defendant and attempting to explain those facts that did not fit within official theories. These official tendencies were further exacerbated by the fact that a police officer was one of the victims. Defense counsel had neither the manpower nor the funding to undertake a necessarily extensive investigation.

The Fifth Amendment provides that no person can be deprived of life, liberty, or property without due process of law. The Sixth Amendment allows an accused to have assistance of counsel for his defense. Both of these provisions have been made applicable to the States through the Fourteenth Amendment. The fine-sounding words of these Amendments mean little if they are not of practical application. Provision of counsel becomes a virtual formality without investigative assistance. Congress has recognized the necessity of such assistance with the promulgation of 18 USC Section 3006A. Unlike the Arkansas statute, payment in excess of the $300 maximum can be granted in exceptional cases. There are numerious aspects to the unconstitutionality of the Arkansas statute. There is a basic and fundamental deprivation of due process of law: the State concentrates its resources on prosecuting the defendant, the defendant cannot prepare a defense. Similarly he is denied equal protection of the laws as his indigency prevents the preparation available to wealthier defendants. More fundamentally, the statute restricts effective assistance of counsel. Counsel cannot render effective assistance unless many of the services available to the prosecution are also available to the defendant. Effective assistance requires that each defense in the defendant's favor should be sought out, efficiently prepared, and adequately presented. Mason v. Arizona, 504 F2d 1345 (9th Cir. 1974). This is in accordance with the principle enunciated in Griffin v. Illinois, 351 US 12 (1956). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." At 19. The testimony of witnesses provides illustration of the impact of insufficient investigative assistance. Although the Sixth Amendment provides for obtaining compulsory process of witnesses, that right is valueless unless those witnesses can be discovered. A lack of funds can prevent a defendant from being able to offer a defense. Concurrently, a defendant is

entitled to confront the witnesses against him. Unless provided sufficient investigative assistance, the cross-examination of the State's witnesses will be ineffective. See "The Indigent's Right To An Adequate Defense: Expert And Investigational Assistance In Criminal Proceedings", 55 Cornell Law Review 632 (1970) for a complete discussion of the issues enumerated above.

The fatal flaw of the Arkansas statute is that in its zeal to limit excessive expenditures of the public's funds, it makes no provision for waiving that limitation in extreme and complicated cases like 18 USC 3006A. The State's desire to limit funding for indigent defendant's interferes with the defendant's ability to defend himself.

This Court should grant certiorari and declare the investigative assistance limitation set out in Ark. Stat. Ann Section 43-2419 to be violative of the Fifth, Sixth, and Fourteenth Amendments.

III. MATERIALS SEIZED FROM PETITIONER AND HIS AUTOMOBILE WERE OBTAINED ILLEGALLY AS FRUIT OF PETITIONER'S ILLEGAL ARREST AND INVALID CONSENT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS AND SHOULD BE SUPPRESSED.

On January 6, 1981, Petitioner was taken into custody by Fort Smith, Arkansas police officers for the investigation of the disappearance of four persons, including a Fort Smith police detective, the previous day. Petitioner was contacted at his work site, outside of the Fort Smith city limits and the jurisdiction of the Fort Smith police, and was asked to go to the police department (R.804). At that time he was interrogated (R.808) and signed a "consent to search" form for his vehicle which had been driven from the work site to the police department (R.810). Petitioner's vehicle was

searched (R.873) and various items were seized, including the vehicles's license plate and matchbooks similar to those carried by one of the victims, that were later introduced into evidence by the State at Petitioner's trial. Prior to trial, Petitioner had moved that these items be suppressed on the grounds of an illegal search and seizure pursuant to the Fourth and Fourteenth Amendments (R.81-84). The trial court denied the motions to suppress (R.973).

The striking feature of Petitioner's case is the overwhelming similarity to the arrests in Brown v. Illinois, 422 US 590 (1975), Dunaway v. New York, 442 US 200 (1979) and Taylor v. Alabama, ___ US ___, 73 LEd2d 314, 102 SCt 2664 (1982). As in those cases, Petitioner was brought to the police station for investigation and interrogation (R.807). The Fort Smith police knew they lacked jurisdiction and probable cuase to arrest Petitioner. One officer attempted to justify Petitioner's detention by claiming he was investigating an allegedly forged check from another jurisdiction (Crawford County, Arkansas) (R.839). That explanation is inadequate because a police officer from Crawford County, Arkansas accompanied the Fort Smith police officers not in his official capacity but to assist the Fort Smith officers (R.846). If the Fort Smith officers were actually investigating the check, assuredly the Crawford County officer would have been present and involved when Petitioner was questioned. Another officer stated that they were not investigating a forgery, they were investigating the disappearance of four people which was not revealed to Petitioner until he had made a statement and signed a "Consent to Search" form (R.902). Although the officers testified that they advised Petitioner he was not under arrest, they did not advise him that he did not have to accompany them to Fort Smith or that he could leave (R.804). The officers did not choose to question Petitioner at the work site but took him into custody and returned with him to the

police station (R.806). The officers also seized Petitioner's car and took it to Fort Smith rather than leaving it at the work site (R.810) an indication that the officers did not intend to return Petitioner to his employment. Petitioner's automobile was brought to Fort Smith so that it could be searched (R.830). Although the Fort Smith officers denied viewing Petitioner as a "suspect" (R.890), they clearly believed that they had their suspect in custody by 1:00 P.M. (R.943). The officers never denied that Peitioner was not free to leave the police station after their arrival in Fort Smith. If Petitioner could not remove himself from police custody, he was technically under arrest pursuant to Ark. Stat. Ann Section 43-412. It was the restraint or consent to restraint which constituted the arrest and it was not necessary for the officers to specifically advise Petitioner that he was under arrest. McDonald v. State, 253 Ark 812, 491 SW2d 36 (1973). Of course, given the nature of the police contact in this case, it is irrelevant whether this intrusion was an arrest under state law. Dunaway v. New York, supra. Finally, the illegality of Petitioner's arrest had that quality of purposefulness described in Brown v. Illinois, supra. The officers admitted they did not have probable cause to arrest Petitioner and acknowledged that the purpose of their action was investigation or questioning. The arrest was solely investigatory, the police hoping for something to turn up. As in Brown, the manner in which the arrest was effected gave the appearance of having been calculated to cause "surprise, fright, and confusion". Furthermore, the officers admitted withholding pertinent information from Petitioner, such as the real reason for his detention until they had obtained what they sought, a statement and the consent to search. (R.894-895). As Petitioner's arrest was illegal, the materials seized pursuant to the consent to search was also illegal as "fruit of the poisonous tree" having been obtained in exploitation of the illegal arrest.

Wong Sun v. United States, 371 US 471 (1963). Therefore, the matchbooks, license plate, and all other items seized from the vehicle were obtained in violation of the Fourth Amendment and Fourteenth Amendment and should be suppressed.

Even assuming that the arrest was not illegal (which Petitioner does not concede), the State did not carry its burden of showing that the consent was freely and voluntarily given and not as acquiescence to a claim of lawful authority. Bumpers v. North Carolina, 391 US 543 (1968). There are several factors indicating that the consent to search in this case was not valid. The most important is that Petitioner was illegally arrested, was in custody at the police station, and was being closely questioned by the police officers. The officers did not inform Petitioner that they were investigating the disappearance of four people but stated they were only investigating the check from Larry Price's account. The officers did not correct their purposely misleading comments to Petitioner until after the search had been completed; at which time Petitioner exercised his Constitutional right to remain silent (R. 888). The consent to search was not obtained on the highway or at Petitioner's home or work site as envisioned in Schneckloth v. Bustamonte, 412 US 218 (1973). The police did not ask for permission to search the vehicle at Petitioner's work site, they brought Petitioner and his vehicle to the police station before seeking his consent to the search. The police did not advise Petitioner he did not have to consent to a search or that he could revoke his consent at any time. Nor did they advise him that he did not have to accompany them to the police station prior to the giving of consent. The fact that the consent to search was obtained while Petitioner was in custody creates substaintial questions as to the validity of the consent, which questions the State did not eradicate. As the consent to search was invalid, the items taken from Petitioner's vehicle were seized illegally and should be suppressed.

The Court should grant certiorari and order that the statement made by Petitioner and materials seized from his vehicle were obtained in violation of the Fourth Amendment and Fourteenth Amendment and should be suppressed.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW AND DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN THE EXISTENCE OF A POTENTIALLY CRUCIAL WITNESS WAS WITHHELD FROM PETITIONER AND DEFENSE COUNSEL.

On January 5, 1981, four persons disappeared from Fort Smith, Arkansas. The bodies of three of those persons were discovered on the next day, January 6, 1981. The last body discovered, that of Larry Price, was found on January 7, 1981. The last witness put on by Petitioner was Crawford County, Arkansas Deputy Sheriff Bill Grill. On January 7, 1981, Mr. Grill received a telephone call disclosing where Larry Price's body could be found. Over the next few months preceeding that trial, Mr. Grill refused to disclose the identity of the caller despite repeated requests from defense counsel (R.3591). During his trial testimony Mr. Grill revealed the name of the caller for the first time and stated that although he had always known the identity of the caller, he had honored the caller's request for anonymity (R.3598). The defense moved for the declaration of a mistrial alleging that the officer's non-disclosure of pertinent information had deprived the defendant of due process and interfered with his ability to defend himself (R.3593). The trial court denied the motion for a mistrial (R.3595). The Arkansas Supreme Court affirmed the trial court's decision (App., p. A12)

One of the very first motions filed by Petitioner was a

motion for discovery based largely on the Arkansas Rule of Discovery, Rule 17.1 of the Arkansas Rules of Criminal Procedure, which included a request for the names and addresses of all potential witnesses and any evidence which would tend to negate the guilt of the defendant. Brady v. Maryland, 373 US 83 (1963). Under Arkansas law knowledge possessed by a police officer is imputed to the prosecuting attorney. Williams v. State, 267 ARK 527, 593 SW2d 8 (1980); Lacy v. State, 272 Ark 333, 614 SW2d 235 (1981). Therefore, whether the prosecutor in the present case was ever actually aware of the information possessed by the officer is irrelevant under Arkansas law. The cases and rules cited above make no provision for good or bad faith on the part of the prosecutor or the officer (although Petitioner questions the good faith of the officer).

The leading case in this area has been traditionally viewed to be Brady v. Maryland, supra, wherein the Court stated: "We now hold that the suppression by prosecution of evidence favorable to an accused upon request violates due process of law where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." At 87. The Court discussed the issue in much greater detail in United States v. Agurs, 427 US 97 (1976) which the Court expressly made applicable to the States. At 107. The present case does not involve the situation where there has been either a general request for Brady material or no request at all. The request here was direct and repeated (R.3598) and under Arkansas law imputed to the prosecutor. Lacy v. State, supra.

The non-disclosure of the informant's identity had serious repercusions for Petitioner's case. There is a severe denial of due process. The defense was denied the opportunity to interview crucial witnesses who could well have possessed vital and exculpatory evidence. The defense was unable to ascertain the circumstances of the discovery of one of the

bodies. It should be noted that the State never claimed, either through the prosecutor or the officer that the identity of the informant was known but confidential. The State consistently represented that the informant was anonymous and thus unknown. The officer not only lied about the anonymity of the caller, he withheld crucial information from the defense -- which made it impossible for Petitioner to prepare his defense.

Another aspect to this issue is that Petitioner's Sixth Amendment rights were also violated. The non-disclosure interfered with effective assistance of counsel. Defense counsel were unable to effectively prepare the case due to the inability to interview crucial witnesses. The impact of this prospective testimony is incalcuable. If the testimony would have been favorable to the defendant, the right of compulsory process was rendered valueless.

Finally, the evidence against the Petitioner was hardly overwhelming. There were no direct witnesses to the murders (although the State produced a "witness" who claimed he saw Petitioner abduct three of the victims. (R.2897 to R.2970). His testimony was replete with contradictory and even impossible statements (e.g. that it wasn't dark at 6:30 P.M. on January 5, 1981.). The State relied heavily on circumstantial evidence and testimony from forensic pathologists as to hair and blood comparisons. Even if the testimony from the prospective witnesses was of relatively minor importance, it could have been sufficient to create a reasonable doubt.

This Court should grant certiorari. The Court should rule that Petitioner has been deprived of due process and effective assistance of counsel under the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment and order the case remanded for a new trial.

V. THE ARKANSAS CAPITAL MURDER STATUTE, ENCODED AT ARK. STAT. ANN SECTION 41-1501, OVERLAPS WITH THE FIRST DEGREE MURDER STATUTE, ARK. STAT. ANN SECTION 41-1502, IS VAGUE AND MISLEADING AND PROVIDES NO DIRECTION FOR THE JURY LEADING TO AN ARBITRARY AND CAPRICIOUS EXERCISING OF DISCRETION BY THE JURY IN VIOLATION OF THE FIFTH AMENDMENT, EIGHTH AMENDMENT, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In 1972, this Court held that the death penalty was cruel and unusual punishment under the Eighth Amendment made applicable to the States by the Fourteenth Amendment. Furman v. Georgia, 408 US 238 (1972). Furman's basic concern was that the death penalty should not be imposed in an "arbitrary or capricious" manner.

Arkansas' capital murder procedure, Ark. Stat. Ann Section 41-1301, basically provides that a defendant in such a case receives a bifurcated trial, the first stage determining guilt or innocence, the second stage determining sentence. The capital murder statute 41-1501(1)(a) relates that a person commits such an offense when he commits or attempts to commit one (or more) of seven listed felonies, and "in the course of or furtherance of the felony, or in immediate flight therefrom", he causes the death of any person "under circumstances manifesting extreme indifference to the value of human life". Ark. Stat. Ann Section 41-1501(1)(a). Petitioner was charged by Information (App., p.A20) and convicted pursuant to this provision. The first degree murder statute uses exactly the same language except that it substitutes "a felony" in place of the seven felonies listed in the capital murder statute. Ark. Stat. Ann Section 41-1502(1)(a). The Arkansas Supreme Court has held that the phrase "a felony" includes the seven listed felonies

described in the capital murder statute. Earl v. State, 272 Ark 5, 612 SW2d 98 (1981). Thus, by definition, an offense alleged under Ark. Stat. Ann Section 41-1501(1)(a) includes the "felony murder" rule in Ark. Stat. Ann Section 41-1502(1)(a).

Following presentation of all the evidence, Arkansas procedure provides that the jury is to be instructed as to the applicable law. In every case where a defendant is charged under Ark. Stat. Ann Section 41-1501(1)(a), he is absolutely entitled to an instruction under Ark. Stat. Ann Section 41-1502(1)(a). In practical terms there can be no distinction between offenses under either statute. The jury is left without guidance to attempt to decide whether a defendant committed a specific felony or committed "a felony". There is absolutely no rational basis for distinguishing the two clauses and it is left to the completely unfettered and undirected discretion of the jury to choose whichever statute they please leading to completely uncontrolled results. Roberts v. Louisiana, 428 US 325 (1976). The guilt determination often will depend on whether the jury feels that the defendant deserves the death penalty. Beck v. Alabama, 447 US 625 (1980) An excellent example of the completely arbitrary nature of this system is shown by the case of two co-defendants charged with the capital murder of two persons in the course of a jewelry store robbery. (The defendant's were tried separately.) In Perry v. State, 277 Ark 357, 642 SW2d 865 (1983) the defendant insisted he was not guilty and proceeded to trial. The jury found Perry guilty of capital murder and sentenced him to death. In Anderson v. State, 278 Ark 171, 644 SW2d 278 (1983), the defendant went to trial and admitted involvement in the offense but alleged that he only went to commit robbery and that Perry killed the victims without Anderson's assistance. The jury, in an obvious attempt to avoid imposing the death penalty, found Anderson

guilty of first degree murder and sentenced Anderson to life. The evidence against both men was similar (except for Anderson's somewhat self-serving statement) as were their prior criminal records. As they were charged under Ark. Stat. Ann Section 41-1501(1)(a), both men were absolutely entitled to a jury instruction under Ark. Stat. Ann. Section 41-1502(1)(a). This is unlike the situation in Hopper v. Evans, 456 US 605 (1982), where the Court ruled that Alabama's failure to provide the possibility of an instruction for a lesser included offense was not fatal where there was no basis under Alabama law for such an instruction Beck v. Alabama, supra. Either man could have been found guilty of either offense. There was no rational basis for the jury to vote for death on the one hand and life on the other.

The Arkansas statutory construction practically begs for the "freakish and wanton" imposition of the death penalty. It should be noted that although the first degree murder statute now carries a potential sentence of ten to forty years, or life, Ark. Stat. Ann Section 41-901 (amended 1981), when Petitioner was tried, first degree murder carried a potential sentence of five to fifty years, or life, or a fine up to $15,000 or both fine and imprisonment. Ark. Stat. Ann Section 41-803. In other words, two defendants could perform the same acts and one could receive a $1.00 fine while the other received the death penalty, simply depending on whom the jury liked. This statutory construction is so clearly arbitrary, capricious, and directionless that it clearly deprives a defendant of due process of law and constitutes cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

This Court should grant certiorari. The Court should rule that the Arkansas capital murder statute and procedure denies due process of law and constitutes cruel and unusual punishment in violation of the Fifth Amendment, Eighth Amendment, and

Fourteenth Amendment and reverse the case.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted, the decision of that court reversed on all counts, and the cause remanded for a new trial. This Court should set this matter for oral argument on the issues set out above.

Respectfully submitted,

JOHN W. SETTLE
P. O. Box 1902
Fort Smith, Arkansas 72902
(501) 785-2326

Counsel for Petitioner, pro hac vice

CERTIFICATE OF SERVICE

I, John W. Settle, Attorney for Petitioner, hereby certify that I have delivered a copy of the foregoing petition and the accompanying appendix through service by mail by depositing a copy of same in a United States Post Office, with first-class postage prepaid, addressed to Honorable Steve Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas 72201, on this 6th day of May, 1983.

JOHN W. SETTLE

APPENDIX

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR 82-18

Opinion Delivered February 7, 1983.

THOMAS WINFORD SIMMONS,

Appellant,

V.

STATE OF ARKANSAS,

Appellee.

Appeal from Crawford Circuit Court; John G. Holland, Judge.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. Thomas Winford Simmons, age 37, was sentenced to death for capital murder, in that he shot four persons in the back of the head, one of them while handcuffed and helpless. Simmons, represented in the trial court and here by the public defender, argues 22 points for reversal. We find no prejudicial error of any kind. For convenience we discuss Point 16 first, the sufficiency of the evidence, requiring a narrative of the facts, then the three points on which counsel place particular emphasis, and finally the other 18 points, grouping them when appropriate.

First, a narrative of the evidence. Simmons was charged with having caused the deaths of (1) Larry Price in the course of kidnaping, (2) police officer Ray Tate acting in the line of duty, and (3 and 4) Jawana Price (Larry Price's wife) and Holly Gentry in the course of kidnaping, robbery, and rape. We detail the events as they occurred, beginning on Saturday, January 3, 1981, and continuing through the following Wednesday. We should note at the outset that Simmons has made no statement about the homicides either to the investigating officers or at the trial, resting throughout on the plea of not guilty and his right to remain silent.

Holly Gentry, who was Jawana Price's employer, asked her to sell his car for him, a maroon-silver LTD. The Prices advertised the car for sale. On Saturday afternoon a witness who lived next to the Prices' apartment in Fort Smith saw a man drive up in a small yellow car. (Simmons's car was a small yellow Toyota.) The witness, who noticed the stranger looking at the LTD, told him that the Prices were away for the weekend and suggested that he come back during the week.

Early Monday morning a man came by to look at the LTD, according to statements made by Jawana Price when she went to the police that afternoon to report that her husband was missing. A neighbor testified that he saw Simmons, whom he identified at a lineup and in court, looking at the LTD with Larry Price. According to Jawana's report, her husband and the visitor took a test drive together and were drinking coffee in the apartment when Jawana left for work in her own car.

At some time during the morning Simmons took to his branch bank in Van Buren a $350 check drawn on a Clarksville account that had been closed by the Prices some months earlier. Simmons received $50 in cash and deposited the rest. The Price signature on the check was a forgery. The jury could have concluded that Simmons kidnaped Larry Price, killed him by shooting him in the back of the head, and hid the body in a wooded area not far from Simmons's home at Kibler in nearby Crawford county. The fact that blood from Price's head wound dripped into water just below where his body was hidden indicated that the wound was still bleeding when the body was concealed. The medical examiner

testified that Price's death could have occurred during the day at any time after 8:00 a.m.

That afternoon the witness Seaton, working at a parking lot used by Jawana, noticed a man in a yellow Toyota watching Jawana's car for more than an hour. Seaton wrote down the license number, which was shown to be Simmons's number, but Seaton did not report the incident to the police until the next day, Tuesday.

Larry Price failed to meet Jawana for lunch as they had planned. She also learned that he did not show up for work that day. When she and Gentry left work that afternoon they drove in Gentry's pickup truck to police headquarters, where they reported Larry to be missing. They talked to Officers Davis and Tate. At about 6:00 p.m. Gentry and Jawana left the police station to go to the Prices' apartment, and Officer Tate left in his unmarked blue police car to meet them there. Shortly before that a man not clearly identified had engaged a taxicab and had been dropped off at the Prices' apartment complex.

James Davis, a neighbor across the street, saw a man (evidently Officer Tate) arrive at the Prices' apartment complex in a blue car. The man looked briefly at the truck and then went into an apartment. Shortly after that another man made three trips from an apartment to the blue car. The first time he brought out a man whose hands were tied behind his back and had him get in the blue car. Next, he brought out another man, also tied, who was put in the car. Third, he brought out a woman, who was crying, and drove off with all three. Officer Tate had reported in by radio when he arrived at the apartment complex; he was never heard from again. Late that night Tate's police

car and Gentry's LTD were found parked in public areas in or near Fort Smith.

When the branch bank opened on Tuesday morning, Simmons was waiting to get in. He asked for the return of the check he had deposited the day before. The two bank employees connected the name on the check, Larry Price, with the missing-persons account that was already extensively in the news. They mentioned that fact to Simmons, but said they did not have the check at the branch. When Simmons drove away his license number was written down by one of the bank employees, whose husband was a police officer. She at once called her husband about the incident. A quick investigation traced the number to Simmons, who had given his name and address at the bank. It was also learned that Simmons was on parole from a federal prison (a fact not disclosed to the jury), that he worked at a sand and gravel company near Fort Smith, that he had not been at work on Monday, having called in to say that he had an accident in his car, and that he was at work on Tuesday.

Several officers went out to the sand and gravel company to interview Simmons. According to them, he was cooperative and readily agreed to accompany them to headquarters for questioning about the check. At a suppression hearing the officers testified that Simmons explained he had encountered Larry Price on Sunday night and had received the check as payment for a sale of marihuana. He encountered Price at a later meeting on Sunday night, and Price said the check was bad. When the officers mentioned that Price was missing, Simmons refused to make any further statement and asked for an attorney. The officers then

placed Simmons under arrest for violation of his parole, ceased their questioning, and called the public defender to represent him. None of the testimony about Simmons's explanation was heard by the jury.

At about three o'clock on Tuesday afternoon a farmer working near Kibler, where Simmons lived, happened to find the bodies of Tate, Gentry, and Jawana Price, piled together in a big tractor tire in a field and partly concealed. Tate's hands were fastened behind his back with his handcuffs. On the basis of their total information the police charged Simmons with the murders at about 5:40 p.m. Larry Price's body was found by a deputy sheriff in the woods near Kibler on Wednesday, as a result of a telephone call.

Scientific testimony and other evidence provided much additional proof of Simmons's guilt. As to robbery, missing from the three bodies were the three men's wallets and Jawana's purse. As to rape, Jawana's body had slight bruises in the genital area, her pantyhose were on wrong side out, a belt was not through all its loops, and semen in her vagina matched Simmons's blood type but not that of Larry Price. A pistol lying under the three bodies was positively identified as the murder weapon. Its serial number had been filed down, but the number could be determined. That pistol had been bought by a neighbor of Simmons's, who had lost it in the woods some two years earlier and had reported the loss to the police. From the proof the jury could have found beyond a reasonable doubt that a hair from Simmons's body was discovered in Officer Tate's shirt and another hair from

Simmons's body was found in Larry Price's sock. We have no doubt about the sufficiency of the evidence, circumstantial though it was.

Point 1 assigns error in the trial judge's denial of a requested change of venue. There was, understandably, much media publicity during the first few days, when the four victims were missing and after their bodies were found. Later the news coverage was not especially extensive. The affidavits submitted with the motion were conflicting, with the State's outnumbering those of the movant's. Most important, the twelve jurors and two alternates, without exception, were accepted as "good for the defense." More then seven months elapsed between the original publicity and the trial. Only six of about sixty prospective jurors were excused because of their beliefs about Simmons's guilt. We agree that Simmons would have been entitled to a change of venue beyond the two-county circuit had the proof required a change, but it did not. The court was right in denying the motion. See Perry v. State, 277 Ark. 357, ___ S.W. 2d ___ (1982).

Point 2 questions the denial of motion in limine by which defense counsel sought a ruling that if Simmons chose to testify the State could not impeach him by evidence of previous felony convictions if counsel first offered to concede that Simmons had previously been convicted of one felony.

Neither branch of counsel's twofold argument can be sustained. Primarily, it is argued that when counsel admitted one felony conviction, Simmons would then be effectively discredited and could not be further impeached by proof of other convictions (of which

he had several). Neither the common law nor Uniform Evidence Rule 609 supports the argument. The common law permitted impeachment by proof of any felony conviction; Rule 609 contains limitations as to the time and nature of the convictions and as to their comparative probative value, but none as to their number. If proof that a witness has been convicted of murder or theft or perjury is admissible to impeach his veracity, as it usually is, then proof that he has committed such offenses time and time again may fairly be considered by the jury as further impairing his credibility. Counsel misinterpret our holding in Campbell v. State, 264 Ark. 372, 571 S.W. 2d 597 (1978). There a State's witness had been impeached by a felony conviction. Campbell, trying his own case, asked the witness "the actual date and time that you received, or were sent to the penitentiary?" The trial judge disallowed the question, as irrelevant. We affirmed, saying: "[I]t is the fact of conviction that impairs the witness's credibility, not the date of the sentence or its length." Our point was that the details inquired about were not relevant. We did not mean that the bare fact of a conviction of a felony precludes the cross-examiner from identifying that felony and others underlying the previous convictions. To the contrary, Uniform Rule 609, by requiring that probative value be weighed against prejudice and by admitting all convictions involving dishonesty, undeniably contemplates that the jury will know just what crimes the witness has been convicted of.

Secondarily, counsel argue that proof of a prior conviction for kidnaping would have been inadmissible, because its prejudicial effect would have outweighed its probative value in this case, where kidnaping is also involved, Our holding in Jones v. State, 274 Ark. 379, 625 S.W. 2d 471 (1981), is cited, but it is not controlling. There the defendant, a

grown man, was charged with having sexually molested a nine-year-old boy. We held that an earlier similar conviction involving another little boy was not admissible, because its prejudicial effect would clearly outweigh its probative value as bearing on credibility. It is common knowledge, however, that mature men who derive pleasure from sexual contact with very young boys are apt to repeat such conduct; so the prejudicial effect of the prior offense does overshadow its potential worth on the narrow issue of credibility. In Jones we pointed out that there may be instances in which proof of an earlier conviction for the same crime as that on trial may be admissible. Kidnaping, unlike sexual abuse of minors, is not the sort of offense that perverted people are apt to commit again and again. We cannot say that the trial judge abused his discretion in concluding that a prior conviction for kidnaping would be admissible if Simmons elected to testify.

As to such an election, we make a point for the future. A motion in limine, asking for an advance ruling that the defendant not be exposed to cross examination about certain convictions, is subject to abuse, in that the accused may not intend to testify at all and yet seek a ruling in the hope of leading the trial judge into reversible error, with the possibility of a new trial and a second chance of acquittal. Some courts have met the problem by denying review unless the defendant actually testifies at the trial. That has not been our position in the past, nor is it now. We do adopt, however, the rule approved by the majority in United States v. Cook, 608 F. 2d 1175 (9th Cir. 1979), where the opinions on both sides discussed all aspects of the problem. The majority summed up its ruling as follows:

> In future cases, to preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

In adopting what we regard as the better rule we realize that in some instances a defendant may prefer not to outline his expected testimony at a pretrial hearing held before the prosecution's witnesses have testified. In that situation the trial judge may postpone a ruling upon the motion in limine until the State has rested and the time has come for the defendant to reach his final decision about testifying. At that stage of the trial there would be scant basis for his refusal to outline the testimony he expects to give almost immediately.

In Point 12 counsel attack the admissibility of various physical exhibits introduced in evidence by the State, as being fruits of the poisonous tree, because (a) Simmons was illegally arrested at his place of work, (b) his consent to search his car was invalid, and (c) search warrants under which his house was searched and under which samples of his blood and hair were taken were not supported by sufficient affidavits.

Subpoints (a) and (b) may be discussed together, both turning upon issues of fact. The undisputed testimony is that Simmons willingly accompanied the officers to the police station and that he willingly consented to the search of his car. As in Lascano v. State, 275 Ark. 346, 631 S.W. 2d 258 (1982), the officers were not asked whether they told Simmons that he did not have to accompany them. It is argued that the officers should

have told Simmons that he was a suspect in the disappearance of four persons, but that assertion is too sweeping. The officers knew that Simmons was on parole, that he had sought the return of a Price check he thought to be bad, and that he had not been at work on Monday. Innocent explanations were obviously possible. Simmons's statements to the officers were not put before the jury. The only exhibits taken in the search of his car were the license plate, which was otherwise provable in countless ways, and a matchbook, the relevance of which is not clear. Thus on subpoints (a) and (b) the trial judge's decision on issues of fact is not clearly erroneous, and even if it were no prejudice has been shown.

As to (c), we need not quote the detailed affidavits for the search warrants. The only really serious argument here is that the affidavits did not show the reliability of two informants: James Davis, who saw the three victims being taken from the apartment to Tate's car, and Donald Seaton, who saw Simmons watching Jawana's car at the parking lot. Davis and Seaton, however, were not confidential informants whose identity was being protected. They volunteered information simply as good citizens. The police necessarily rely upon such information every day in the course of their work, without first exploring abstract issues of credibility. Hence no additional support for the reliability of Davis and Seaton was required. Hadley v. State, 391 So. 2d 158 (Ala. Cr. App., 1980); People v. Bell, 96 Ill. App. 3d 857, 421 N.E. 2d 1351 (1981); State v. Watson, 588 S.W. 2d 178 (Mo. App., 1979).

Points 3, 4 and 13 have to do with pretrial decisions. In Point 3 it is argued that the defense should have been allowed

more than $200 to conduct its investigation into possible defenses. Counsel, however, do not show that the amount was inadequate or even suggest any defense that might have been discovered. Their client, whether innocent or guilty, surely was aware of any facts that might establish his innocence. As to Point 4, the validity of our death penalty statute has been settled by many cases, beginning with Collins v. State, 261 Ark. 195, 548 S.W. 2d 106, cert. denied, 434 U.S. 878 (1977). Point 13, questioning the lineup procedure, is also without merit. From a lineup of men not greatly dissimilar to Simmons in general appearance, he was picked out by the witness Gilbert, who had talked to Simmons for about five minutes on Saturday, only four days before the lineup, and by the witness Kremen, the neighbor who had seen Simmons and Larry Price looking at the for-sale LTD only two days earlier. Under the various tests of reliability enumerated in Mayes v. State, 264 Ark. 283, 288, 571 S.W. 2d 420 (1978), and other cases, the trial judge's decision was not wrong.

Points 5, 6, 7, and 8 concern the selection of the jury. Point 5 must be rejected, for we have often held that a death-qualified jury is constitutional. Points 6 and 7 complain of counsel's having had to use peremptory challenges for prospective jurors after challenges for cause had been denied. The challenges for cause were properly denied, and in any event the defense was not compelled to accept any juror who was not pronounced good by counsel. Under Point 8 it is argued that the State should not have been allowed to peremptorily challenge two jurors who had already been accepted by both sides. That procedure was

approved in Conley v. State, 272 Ark. 33, 612 S.W. 2d 722 (1981), where the defense had no peremptory challenges left when the State was allowed to excuse a juror already seated. By contrast, here the defense still had three challenges left when the two jurors were excused. In fact, the defense apparently did not suffer from a shortage of peremptory challenges, because (a) the prosecutor cooperated by making no objection to defense challenges for cause, (b) defense counsel mentioned more than once that they had to exhaust their peremptory challenges to preserve their objection to venue, and (c) no juror was forced upon the defense. No possible prejudice from the court's procedure appears.

Five points relate to the admissibility of evidence. Point 9: The prosecution did not unfairly withhold evidence merely because the deputy sheriff who received a telephone call about the discovery of Larry Price's body at first protected the caller's request for anonymity, but disclosed the caller's identity at the trial after the caller had given permission. There is no indication that the officer acted in bad faith, that he had disclosed the name to the prosecutor, or that the defense was handicapped by not knowing earlier the identity of the caller. There was no request for a continuance. Point 10: The court correctly refused to admit proof that some of Simmons's relatives had blood type A, which was the Prices' type and the type found on Simmons's trousers. There was no proffer of proof that the relatives' blood could in any way have gotten upon the trousers. Point 14: The four photographs complained of were relevant and in no manner whatever apt to inflame the jury. Point 15: Any possible gaps

in the chain of custody of blood samples were inconsequential, and there was no substantial indication of possible tempering. Davis v. State, 275 Ark. 264, 630 S.W. 2d 1 (1982). Point 18: During the penalty stage of the two-step trial the court correctly refused to allow the defense to introduce pictures of a gas chamber, a gallows, and an electric chair, none of which can be regarded as a mitigating circumstance. Such circumstances, as typified by the six listed in Ark. Stat. Ann. § 41-1304 (Repl. 1977), are applicable only to the particular defendant, not to capital punishment in general.

Five points relate to matters occurring after the parties had rested their case. Point 11: Whether to send the jury to the scene of the Prices' apartment, to determine how well the witness Davis could have seen the three victims being taken to the car at some imprecise time after sunset, was a matter addressed to the trial judge's discretion. Hogan v. State, 224 Ark. 191, 272 S.W. 2d 312 (1954). No abuse of discretion is shown. Point 17: The court was right in submitting to the jury the various charges of capital murder, for we have already seen that there was substantial evidence to support each verdict. Points 21 and 22: The court refused to instruct the jury that it had to presume that if Simmons were sentenced to life imprisonment without parole he would spend the rest of his life in prison and refused to rule that if defense counsel made such an argument to the jury the prosecutor should be prohibited from mentioning in reply the possibility of executive clemency. Both rulings were right. For the reasons fully explained in Andrews v. State, 251 Ark. 279, 472 S.W. 2d 86 (1971), the judge should not, and therefore counsel should not, attempt to explain matters of parole or other executive clemency to the jury.

Point 19 is novel. The verdict forms submitted to the

jury in a capital case restrict the jury to certain aggravating circumstances, but the jury is not restricted in finding mitigating circumstances. Here the forms pertinent to the murder of Jawana Price, Tate, and Gentry, were returned with a notation that some of the jurors felt that "fear of detection" was a mitigating circumstance. Counsel asked for a mistrial, arguing that the jury must have misunderstood the court's instructions, because fear of detection would be an aggravating circumstance, not a mitigating one. The court refused to declare a mistrial; an offer to poll the jury was declined by the defense.

The court was right, for either of two reasons. The jury's answers to the questionnaire must be interpreted by considering how they could have understood the question. Miller v. State, 269 Ark. 341, 355, 605 S.W. 2d 430 (1980). Since the jury did not insert "fear of detection" as a mitigating circumstance in the death of Larry Price, which apparently occurred before the three other deaths, some jurors might have felt that fear of detection for the first murder mitigated the coldbloodedness of the other three. That view would have made their response a proper one. Second, if the verdict was ambiguous the judge could have sent the jury back for a further explanation of its intent. Clift v. Jordan, 207 Ark. 66, 178 S.W. 2d 1009 (1944). Since counsel stood upon the motion for a mistrial and permitted the jury to be discharged without a clarification of the verdict, we cannot now resolve a highly doubtful speculation in the appellant's favor. Reynolds v. Nutt, 217 Ark. 543, 230 S.W. 2d 949 (1950).

Finally, the argument under Point 20 that the penalty was so severe as to indicate passion and prejudice cannot be sustained. In comparing this death sentence with similar cases, as is our practice, we know of no other case involving multiple murders so coldblooded, so brutal, so lacking in any trace of humanity, as those committed by Simmons. We cannot attribute the verdict to passion or prejudice or say that it is arbitrary in comparison with other cases. Nor do we find any prejudicial error in any other ruling adverse to the defendant.

Affirmed.

APPENDIX "B"

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

DONA L. WILLIAMS
CLERK

ROBIN HENDERSON
CHIEF DEPUTY

LESLIE W. STEEN
DEPUTY

JANIE OWEN
DEPUTY

VERNON L. DUTTON
DEPUTY

MELISSA FULLER
DEPUTY

DENISE SELBY
DEPUTY

March 14, 1983

John W. Settle
Attorney at Law
P. O. Box 1902
Fort Smith, AR 72902

Re: CR82-18 Thomas Simmons
v. State of Arkansas

Dear Mr. Settle:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

Dona L. Williams

Dona L. Williams, Clerk

DLW:rh

cc: Leslie M. Powell
Georgia Polk

APPENDIX "C"

ARKANSAS STATUTES ANNOTATED

41-1301. Trial of persons charged with capital murder. -- The following procedures shall govern trials of persons charged with capital murder.

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 (Section 41-1302); except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 (Section 41-1303), or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1301 (Section 41-1301) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

APPENDIX "D"

18 U.S.C. Section 3006A:

(a) Choice of plan. -- Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor . . ., or (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense . . .

(e) Services other than counsel. --

(1) Upon request. -- Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has no jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request. -- Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other

services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.

(3) Maximum amounts. -- Compensation to be paid to a person under this subsection, or to be paid to an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

IN THE CRAWFORD COUNTY CIRCUIT COURT FOR THE VAN BUREN DISTRICT

STATE OF ARKANSAS

vs.

THOMAS WINFORD SIMMONS

FILED

JAN 8 1981

at _____ o'clock _____

Rick Green, Circuit Clerk

Crawford County, Van Buren, Ark.

I, Ron Fields, Prosecuting Attorney within and for the Twelfth Judicial Court of the State of Arkansas, of which the Van Buren District of Crawford County is a part, in the name and by the authority of the State of Arkansas, on information accuse the defendant THOMAS WINFORD SIMMONS of the crime of CAPITAL MURDER (41-1501) Class A Felony (4 counts)

committed as follows: The said defendant Thomas Winford Simmons, in the County, District and State aforesaid, on or about the 5 day of January 19 81, did unlawfully and feloniously,

during the commission of Kidnapping and in the course of and in furtherance of the Kidnapping cause the death of Larry Price under circumstances manifesting extreme indifference to the value of human life

II. did unlawfully and feloniously with the premeditated and deliberated purpose of causing the death of Ray Tate, a Fort Smith Police Officer acting in the line of duty, cause the death of Ray Tate

III. did unlawfully and feloniously during the commission of Kidnapping, Robbery and Rape and in the course of and in furtherance of the Kidnapping, Robbery and Rape, cause the death of Jawana Price, under circumstances manifesting extreme indifference to the value of human life

IV. did unlawfully and feloniously during the commission of Kidnapping, Robbery and Rape and in the course of and in furtherance of the Kidnapping, Robbery and Rape, cause the death of Holly Gentry, under circumstances manifesting extreme indifference to the value of human life

against the peace and dignity of the State of Arkansas.

Ron Fields

Prosecuting Attorney

Subscribed and sworn to before me this 8 day of January, 19 81.

RICK GREEN

Circuit Clerk

By _____

Deputy Circuit Clerk

82-6697

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
MAY 10 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THOMAS WINFRED SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
ON PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner and as grounds for his Motion states the following:

I.

That on February 7, 1983, the Arkansas Supreme Court affirmed Petitioner's Capital Murder convictions and sentences and denied his Petition for Rehearing on March 14, 1983.

II.

That on April 7, 1983, Petitioner filed in the Arkansas Supreme Court Notice of his intention to file a Petition for Writ of Certiorari for review in this Court.

III.

That Petitioner's counsel during the pendency of his trial and appeal in the Arkansas state courts and presently is the Public Defender for Sebastian County, Arkansas as Petitioner is indigent and cannot afford to retain private counsel.

IV.

That prior to Petitioner's jury trial, he submitted an Affidavit of Indigency to the trial court (a copy of which is attached hereto and marked as Exhibit "A") attesting to his lack of funds and subsequent inability to hire a forensic pathologist.

V.

That the trial court entered an order (nunc pro tunc) finding Petitioner to be indigent and thus eligible for representation by appointed counsel. (A copy of this Order is attached to this Motion and marked as Exhibit "B").

VI.

That Petitioner has completed an Affidavit of Indigency as contemplated by Rule 46.1 of the Rules of The Supreme Court of the United States reflecting his lack of financial resources and inability to pay fees and costs, which affidavit is attached and marked as Exhibit "C".

WHEREFORE, premises considered Petitioner moves for leave to proceed in forma pauperis and to file all motions, notices, briefs, and all other documents without payment of costs or fees.

John W. Settle
Attorney for Petitioner, pro hac vice
P. O. Box 1902
Fort Smith, Arkansas 72902

AFFIDAVIT OF SERVICE

I, John W. Settle, Attorney for Petitioner hereby certify that I have delivered a copy of the foregoing Motion through service by mail by depositing a copy of this Motion in a United States Post Office, with first-class postage prepaid, addressed to: Honorable Steve Clark
Attorney General of the State of Arkansas
Justice Building
Little Rock, Arkansas 72201,
on the 6th day of May, 1983.

John W. Settle
Attorney for Petitioner

Subscribed and sworn to before me this 6th day of May, 1983.

Carol Hutchins
Notary Public

My Commission Expires:

April 30th, 1985

Exhibit "A"

IN THE CIRCUIT COURT OF SEBASTIAN AND CRAWFORD COUNTIES

STATE OF ARKANSAS — PLAINTIFF

VS.

NO. CR-81-4
SEBASTIAN COUNTY

NO. CR-81-8
CRAWFORD COUNTY

FILED
MAY 14 [illegible]
Rick [illegible], Circuit Clerk
Crawford County, Van Buren

THOMAS WINFORD SIMMONS — DEFENDANT

AFFIDAVIT OF INDIGENCY

Thomas Winford Simmons, after first being duly sworn, hereby deposes and states:

I, Thomas Winford Simmons, am presently incarcerated in the Sebastian County Detention Center. I am charged with four counts of Capital Murder and four counts of Kidnapping, and I am being held without bail. I am financially unable to hire an attorney to represent me and as a result the Sebastian County Public Defender's Office has been appointed as my counsel. Due to my incarceration I am unable to work and earn income. I have no money in savings or other financial resources. My attorneys have advised me that we need the assistance of a forensic pathologist, a ballistics expert, and other expert witnesses in order to adequately prepare my defense. If I was financially able, I would hire Anderson Nettleship, M.D., a forensic pathologist of Fayetteville, Arkansas to assist in the preparation of my defense. I would also hire any other experts my attorneys deemed necessary to properly prepare and present my case. Since I am indigent I am asking the Court to order that funds be provided so that Dr. Nettleship and other experts can be retained to assist in the preparation of my defense. I agree to the consolidation of the Kidnapping and Capital Murder cases for trial in order that money can be saved and used to employ these experts to assist in the preparation of my defense.

/s/ Thomas Winford Simmons

STATE OF ARKANSAS)
)
COUNTY OF SEBASTIAN)

I, Carol A. Hutchins, a notary public for Sebastian County, Arkansas, state that Thomas Winford Simmons, after being properly identified, appeared before me on May 13th, 1981, and, after being duly sworn, executed the foregoing Affidavit of Indigency for the purposes contained therein.

Carol A. Hutchins
NOTARY PUBLIC

My Commission Expires:
MY COMMISSION EXPIRES APRIL 30, 1985

Exhibit "B"

CRAWFORD CHANCERY CLERK
1981 NOV 16 PM 12:27
BY

IN THE CIRCUIT COURT OF CRAWFORD COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

V. NO. CR-81-8

THOMAS WINFORD SIMMONS DEFENDANT

O R D E R

On the 8th day of January, 1981, came on to be heard defendant's application for appointment of counsel, and the Court doth find:

I.

That the defendant is charged in this court with four counts of Capital Murder, and is charged separately in the Circuit Court of Sebastian County, Arkansas, Fort Smith District, also in this jurisdiction, with four counts of Kidnapping.

II.

That due to the nature of the offenses charged, defendant is entitled to representation by counsel.

III.

That the defendant has not retained his own counsel.

IV.

That the defendant is found to be an indigent person eligible for representation by appointed counsel.

IT IS, THEREFORE, ORDERED that the Sebastian County Public Defender is hereby appointed to represent the defendant on all charges pending against him in this jurisdiction. This order is entered nunc pro tunc.

CR L

JOHN G. HOLLAND
CIRCUIT JUDGE

Exhibit "C"

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS WINFRED SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

Affidavit in Support of Motion to Proceed on
Petition for Writ of Certiorari Forma Pauperis

I, Thomas Winfred Simmons, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for Writ of Certiorari are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

October 23, 1981 To January 9, 1981
$ 525.00 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Thomas Winfield Simmons

SUBSCRIBED AND SWORN TO before me this 22 day of April 1983

Jimmy Williams

my Comm exp - 10-20-84